JANUARY—FEBRUARY 1947

Case and Comment

The Lawyers' Magazine—Established 1894

IN THIS ISSUE

Volume 52 No. 1

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Closing Arguments for Conviction of Nazi War Criminals

By JUSTICE ROBERT H. JACKSON
U. S. Chief of Counsel, International Military Tribunal
(On leave of absence from U. S. Supreme Court)

Condensed from Temple Law Quarterly, July, 1946

THE defendants denounce the law under which their accounting is asked. Their dislike for the law which condemns them is not original. It has been remarked before that—

"No thief ere felt the halter draw
With good opinion of the law."

. . . of one thing we may be sure. The future will never have to ask, with misgiving, what could the Nazis have said in their favor. History will know that whatever could be said, they were allowed to say. They have been given the kind of a trial which they, in the days of their pomp and power, never gave to any man.

THE CRIMES OF THE NAZI REGIME

The pillars which uphold the conspiracy charge may be found in five groups of overt acts, whose character and magnitude are important considerations in appraising the proof of conspiracy.

1. *The Seizure of Power and Subjugation of Germany to a Police State*

The Nazi Party seized control of the German state in 1933. "Seizure of power" is a characterization used by defendants and defense witnesses, and so apt that it has passed into both history and everyday speech. The Nazi junta in the early days lived in constant fear of overthrow.

In 1933 Goering forecast the whole program of purposeful cruelty and oppression when he publicly announced:

> "Whoever in the future raises a hand against a representative of the National Socialist movement or of the State, must know that he will lose his life in a very short while."

New political crimes were created to this end. It was made a treason, punishable with death,

to organize or support a political party other than the Nazi party. Circulating a false or exaggerated statement, or one which would harm the state or even the Party, was made a crime. Laws were enacted of such ambiguity that they could be used to punish almost any innocent act. It was, for example, made a crime to provoke "any act contrary to the public welfare."

2. *The Preparation and Waging of Wars of Aggression*

From the moment the Nazis seized power, they set about feverish but stealthy efforts, in defiance of the Versailles Treaty, to arm for war.

On September 1, 1939, this rearmed Germany attacked Poland. The following April witnessed the invasion and occupation of Denmark and Norway, and May saw the overrunning of Belgium, the Netherlands, and Luxembourg. Another spring found Yugoslavia and Greece under attack, and in June, 1941, came the invasion of Soviet Russia. Then Japan, which Germany had embraced as a partner, struck without warning at Pearl Harbor in December, 1941, and four days later Germany declared war on the United States.

3. *Warfare in Disregard of International Law*

It is unnecessary to labor this point on the facts. Goering asserts that the Rules of Land Warfare were obsolete, that no nation could fight a total war within their limits. He testified that the Nazis would have denounced the conventions to which Germany was a party, but that General Jodl wanted captured German soldiers to continue to benefit from their observance by the Allies.

We need not, therefore, for purposes of the conspiracy count, recite the revolting details of starving, beating, murdering, freezing, and mass extermination admittedly used against the eastern soldiery.

4. *Enslavement and Plunder of Populations in Occupied Countries*

The defendant Sauckel, Plenipotentiary General for the Utilization of Labor, is authority for the statement that "out of five million foreign workers who arrived in Germany, not even 200,000 came voluntarily."

Sauckel himself reported that male and female agents went hunting for men, got them drunk, and "shanghaied" them to Germany. These captives were shipped in trains without heat, food, or sanitary facilities. The dead were thrown out at stations, and the newborn were thrown out of the windows of moving trains.

Populations of occupied countries were otherwise exploited and oppressed unmercifully.

Terrorism was the order of the day. Civilians were arrested without charges, committed without counsel, executed without hearing. Villages were destroyed, the male inhabitants shot or sent to concentration camps, the women sent to forced labor, and the children scattered abroad. The extent of the slaughter in Poland alone was indicated by Frank, who reported:

> "If I wanted to have a poster put up for every seven Poles who were shot, the forests of Poland would not suffice for producing the paper for such posters."

5. *Persecution and Extermination of Jews and Christians*

The Nazi movement will be of evil memory in history because of its persecution of the Jews, the most far-flung and terrible racial persecution of all time. The persecution began in a series of discriminatory laws eliminating the Jews from the civil service, the professions, and economic life. As it became more intense it included segregation of Jews in ghettos and exile. Riots were organized by party leaders to loot Jewish business places and to burn synagogues. Jewish property was confiscated and a collective fine of a billion marks was imposed upon German Jewry. The program progressed in fury and irresponsibility to the "final solution." This consisted of sending all Jews who were fit to work to concentration camps as slave laborers, and all who were not fit, which included children under 12 and people over 50, as well as any other judged unfit by an SS doctor, to concentration camps for extermination.

Adolf Eichmann, the sinister figure who had charge of the extermination program, has estimated that the anti-Jewish activities resulted in the killing of six millions Jews. Of these, four million were killed in extermination institutions, and two million were killed by *Einsatzgruppen*, mobile units of the Security Police and SD which pursued Jews in the ghettos and in their homes and slaughtered them by gas wagons, by mass shooting in anti-tank ditches, and by every device which Nazi ingenuity could conceive.

Of course, any such program must reckon with the opposition of the Christian Church. This was recognized from the very beginning.

The Gestapo appointed "Church specialists" who were instructed that the ultimate aim was "destruction of the confessional Churches." The record is full of specific instances of the persecution of clergymen, the confiscation of Church property, interference with religious publications, disruption of religious education, and suppression of religious organizations.

The Common Plan or Conspiracy

The central crime in this pattern of crime, the kingpin which holds them all together, is the plot for aggressive war.

. . . the spirit of the whole Nazi administration was summed up by Goering at a meeting of the Council of Ministers, which included Schacht, on 27 May, 1936, when he said,

> "All measures are to be considered from the standpoint of an assured waging of war."

As early as November 5, 1937, the plan to attack had begun to take definiteness as to time and victim. In a meeting which included defendants Raeder, Goering and von Nuerath, Hitler stated the cynical objective:

> "The question for Germany is where the greatest possible conquest could be made at the lowest possible cost."

This Tribunal knows what categorical assurances were given to an alarmed world after the Anschluss, after Munich, and after the occupation of Bohemia and Moravia, that German ambitions were realized and that Hitler had "No further territorial demands to make in Europe." The record of this trial shows that those promises were calculated deceptions and that those high in the bloody brotherhood of Nazidom knew it.

Every Defendant Played a Part

. . . a glance over the dock will show that, despite quarrels among themselves, each defendant played a part which fitted in with every other, and that all advanced the common plan. It contradicts experience that men of such diverse backgrounds and talents should so forward each other's aims by coincidence.

It was the fatal weakness of the early Nazi band that it lacked technical competence. It could not from among its own ranks make up a government capable of carrying out all the projects necessary to realize its aims. Therein lies the special crime and betrayal of men like Schacht and von Neurath, Speer and von Papen, Raeder and Doenitz, Keitel and Jodl. It is doubtful whether the Nazi master plan could have succeeded without their specialized intelligence which they so willingly put at its command. They did so with knowledge of its announced aims and methods, and continued their services after practice had confirmed the direction in which they were tending. Their superiority to the average run of Nazi mediocrity is not their excuse. It is their condemnation.

The War Was Deliberately Planned

The dominant fact which stands out from all the thou-

sands of pages of the record of this trial is that the central crime of the whole group of Nazi crimes—the attack on the peace of the world—was *clearly and deliberately planned.* A week before the invasion of Poland Hitler told his military commanders:

> "I shall give a propagandist cause for starting war—never mind whether it be plausible or not. The victor shall not be asked later on whether we told the truth or not. In starting and making a war, not the right is what matters, but victory."

The propagandist incident was duly provided by dressing concentration camp inmates in Polish uniform, in order to create the appearance of a Polish attack on a German frontier radio station. The plan to occupy Belgium, Holland, and Luxembourg first appeared as early as August, 1938 in connection with the plan for attack on Czechoslovakia. The intention to attack became a program in May, 1939, when Hitler told his commanders that

> "The Dutch and Belgian air bases must be occupied by armed forces. Declarations of neutrality must be ignored."

Thus, the follow-up wars were planned before the first was launched. These were the most carefully plotted wars in all history. Scarcely a step in their terrifying succession and progress failed to move according to the master blueprint or the subsidiary schedules and timetables until long after the crimes of aggression were consummated.

Common Defenses against the Charge of Common Responsibility

The defendants meet this overwhelming case, some by admitting a limited responsibility, some by putting the blame on others, and some by taking the position, in effect, that while there have been enormous crimes there are no criminals. Time will not permit me to examine each individual and peculiar defense, but there are certain lines of defense common to so many cases that they deserve some consideration.

When we analyze the argument that the Nazis did not want war it comes down, in substance, to this: "The record looks bad indeed—objectively—but when you consider the state of my mind—subjectively I hated war. I knew the horrors of war. I wanted peace." I am not so sure of this. I am even less willing to accept Goering's description of the General Staff as pacifist. However, it will not injure our case to admit that as an abstract proposition none of these defendants liked war. But they wanted things which they knew they could not get without

war. They wanted their neighbors' lands and goods. Their philosophy seems to be that if the neighbors would not acquiesce, then they are the aggressors and are to blame for the war. The fact is, however, that war never became terrible to the Nazis *until it came home to them,* until it exposed their deceptive assurances to the German people that German cities, like the ruined one in which we meet, would be invulnerable. *From then on* war was terrible.

But again the defendants claim, "To be sure we were building guns. But not to shoot. They were only to give us weight in negotiating." At its best this argument amounts to a contention that the military forces were intended for blackmail, not for battle.

But from the very nature of German demands, the day was bound to come when some country would refuse to buy its peace, would refuse to pay Danegeld,—

> "For the end of that game is oppression and shame,
> And the nation that plays it is lost."

One of the chief reasons the defendants say there was no conspiracy is the argument that conspiracy was impossible with a dictator. The argument runs that they all had to obey Hitler's orders, which had the force of law in the German State, and hence obedience cannot be made the basis of a criminal charge. In this way it is explained that while there have been wholesale killings, there have been no murderers.

What these men have overlooked is that Adolf Hitler's acts are their acts. It was these men among millions of others, and it was these men leading millions of others, who built up Adolph Hitler and vested in his psychopathic personality not only innumerable lesser decisions but the supreme issue of war or peace. They intoxicated him with power and adulation. They fed his hates and aroused his fears. They put a loaded gun in his eager hands. It was left to Hitler to pull the trigger, and when he did they all at that time approved. His guilt stands admitted, by some defendants reluctantly, by some vindictively. But his guilt is the guilt of the whole dock, and of every man in it.

Defendants Attempt to Blame Their Dead and Missing Co-conspirators

The defendants have been unanimous, when pressed, in shifting the blame on other men, sometimes on one and sometimes on another. But the names they have repeatedly picked are Hitler, Himmler, Heydrich, Goebbels, and Bormann. All of these are dead or missing. No matter how hard

we have pressed the defendants on the stand, they have never pointed the finger at a living man as guilty. It is a temptation to ponder the wondrous workings of a fate which has left only the guilty dead and only the innocent alive.

The chief villain on whom blame is placed,—some of the defendants vie with each other in producing appropriate epithets—is HITLER. He is the man at whom nearly every defendant has pointed an accusing finger.

I shall not dissent from this consensus, nor do I deny that all these dead or missing men shared the guilt. In crimes so reprehensible that degrees of guilt have lost their significance they may have played the most evil parts. But their guilt cannot exculpate the defendants. Hitler did not carry all responsibility to the grave with him. All the guilt is not wrapped in Himmler's shroud. It was these dead whom these living chose to be their partners in this great conspiratorial brotherhood, and the crimes that they did together they must pay for one by one.

ACQUITTAL WOULD DENY THE FACT OF WORLD WAR II

It is against such a background that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of this trial as blood-stained Gloucester stood by the body of his slain King. He begged of the widow, as they beg of you: "Say I slew them not." And the Queen replied, "Then say they were not slain. But dead they are, ..."

If you were to say of these men that they are not guilty, it would be as true to say there has been *no war*, there are *no slain*, there has been *no crime*.

Uncertainty in the Law

Mr. Joseph B. Mann, a late prominent lawyer of Danville, Illinois, was trying a case before Judge Kimbrough in the Circuit Court one day and the Judge had sustained three objections of opposing counsel to three questions which Mr. Mann asked covering what the Judge thought was the same subject matter. On the sustaining of the objection to the third question, the court said, "Mr. Mann you know that that is not the law, and you know that I know that that is not the law." Mr. Mann arose and addressed the court in his usual suave manner and said, "Your Honor, you may know that that is not the law, and you may know that I know that that is not the law, but still it may be the law."

Contributed by: Howard A. Swallow, Danville, Illinois.

Sinful Suitors in a Court of Equity

(Extracts from Tami v. Pikowitz, 138 N. J. Eq. 410)

JAYNE, V. C.

In several of its aspects this cause is an unfashionable one to be introduced to a court of equity for determination. Basically it pertains to the title and possession of a Plymouth automobile which, in the existing industrial conditions, is alleged to be a rare and unique article of personalty.

The parties were employed at the establishment of a war industry, where their acquaintance and ensuing associations originated. Both were married persons, but in the initial period of their companionship neither thought it prudent or necessary to divulge that incidental fact to the other.

While the defendant is noticeably lacking in the physical comeliness of an Adonis, nevertheless the complainant's interest in him, like Aphrodite's, gradually ascended to an altitude of infatuation. When released from work, they frequently convened at a neighboring tavern, where they enjoyed, and she paid for, the refreshments. She bestowed upon him many gifts, such as a wrist watch, a wallet (he conserved his earnings), gloves, neckties, and sun glasses. Indeed, he smoothly persuaded her to loan him $200. Up to this point he rejoiced in playing the role of a subsidized escort. He subsequently permitted her to contemplate the dissolution of their former marriages and their future alliance in matrimony.

On December 14th, 1945, she purchased the automobile at the price of $1,000. She did not have a license to operate a motor vehicle, but the vendor had promised to instruct her. The defendant forthwith expressed to the complainant his ardent desire to visit his relatives in Pennsylvania, and he implored her to permit him to have the use of the car for the accomplishment of that journey but, according to the testimony of the complainant, he shrewdly informed her that if, perchance, the vehicle should be involved in some accident, she, by virtue of her ownership of it, might incur some personal pecuniary liability. He accordingly recommended that it would be entirely feasible and extremely precautious for her to transfer temporarily the apparent ownership of the vehicle to him. She did so on December 20th, 1945, whereupon the defendant departed for Pennsylvania.

During his absence, his wife either fortuitously or designedly met the complainant. The interview inspired the complain-

ant to make an unexpected personal visit at the address in Pennsylvania where the defendant had assured her he intended to sojourn. The defendant was not at that address. The complainant was informed that the defendant could be reached at a designated residence in a nearby village in the company of one "Amelia." It may be inferred that Amelia was no more pleased to meet the complainant than the latter was pleased to meet Amelia.

The circumstances of that occasion caused the curtain of implicit faith to drop from the complainant's eyes, and she discovered that the pretended fidelity of the defendant was merely a deceptive shadow. "Now sighs steal out and tears begin to flow," said Pope.

The defendant returned to Middlesex County, New Jersey, early in January, 1946. The complainant immediately requested him to surrender the automobile and its title to her. He refused. She intimated her intention to consult an attorney. He threatened that should she do so, he would impart to her husband full knowledge of their associations. He then retired as a gigolo to become a cad.

I can attribute some measure of credibility to her testimony, but I do not hesitate to declare that I cannot repose any credence whatever in that of the defendant. The defendant claims the automobile as a remunerative reward for his "meretricious" servitude. His counsel confronts the complainant with the maxim "He who comes into equity must come with clean hands." It is the defendant himself who has sought to soil and besmear the hands of the complainant. The maxim has its limitations. It does not banish all sinful suitors from a court of equity. The iniquitous conduct must be related proximately to the act of the defendant which is the subject matter of the cause of action; it must be evil practice or wrongful conduct in the particular transaction in respect to which the complainant seeks redress.

The complainant's benevo-

lence and the defendant's malevolence do not escape attention. In the posture of the proof in this case I shall not permit the defendant to profit from the feminine weaknesses of the complainant. The defendant acknowledges that he never contributed a penny to the purchase price of the automobile. When first interviewed by an attorney of the complainant, he suggested a compromise by which he might purchase the vehicle by means of installment payments. He has since chosen to darken some corner in which to hide his loot. Indeed, it required some coercion from the bench to induce the defendant to disclose where he was concealing the automobile.

I am unable to accept the doctrine of unclean hands as a positive defense to the complainant's cause of action. I have, however, paused to consider whether there was an absolute, unconditional, and unqualified gift under the rigid rules of the common law. I think not. Notwithstanding the unwholesome motives of the complainant, I conclude that she intended the transfer to be essentially a bailment. The transfer on her part was undoubtedly conditional and deceitfully procured by means of an imposition upon her enchantment.

Professional Reminiscence

I desire to make my Will!
Sez he– in manner terse..
And like a Bard of ancient skill..
His voice proclaimed in verse:

To my "battle axe" sez he:
I leave a lousy dollar,
When I think of how she treated me..
I just boil beneath my collar.

All the rest of my estate,
Except my faithful Ford..
I give to my sister, Martha Tate
To pay for room and board.

As to my faithful Lizzie..
Be it silly or not—
I want it buried with me
In my cemetery lot.

It's yanked me out of many a HOLE
O'er life's highway as we passed
And I declare.. upon my soul!
Out of the GRAVE, it might, at last!

Contributed by:
Attorney Edward J. Berdaus, Washington, D. C.

The Jury Problem

By
Hon. Julius H. Miner

IN recent years much public criticism of juries has attended the acquittal of notorious criminals where the proof clearly indicated their guilt. The trial lawyer and trial judge, whose long and intensive contact with juries in both civil and criminal trials has afforded them a fair opportunity for appraisement, have the conviction that there is frequently a miscarriage of justice because of the lack of ability on the part of the average juror adequately to discharge the duties that devolve upon him in the fact-finding process. The legal profession generally, in spite of its traditional conservatism, shares this conviction.

The right to trial by jury except in chancery cases is of ancient heritage. It has long been regarded as one of the strongest pillars of democratic government. In a very real sense incongruity exists between the full acceptance of the institution of the jury as being vital to a free society and the lethargic tolerance with which its imperfections have been endured through the years. With all its imperfections it is to be preferred to its abolition, if that were the choice. In any program of procedural reform it must be conceded that a reasonable guarantee of a process for ascertaining the truth ought not to be subordinated to any other. Indeed, one is amazed at the startling disproportion in the effort that has been devoted to inconsequential procedural tinkering as compared to that devoted to the improvement of the jury system.

JULIUS H. MINER

Hon. Julius H. Miner is Judge of the Circuit Court of Cook County, Chicago, Illinois. This article was condensed from The Journal of Criminal Law and Criminology, May-June, 1946 issue.

I

The woeful lack of intellectual endowment on the part of a juror is no doubt a most serious difficulty of common occurrence. Such lack of endowment is, to the defense lawyer in a criminal case, the very highest qualification any juror can possess. If a prospective juror discloses intelligence and competency he is promptly excused by the defense. The lawyer's range of inquiry upon selecting a jury frequently covers the juror's personal history as well as his political, social, economic and religious background, the objective being to discover some weakness to be exploited. The highest achievement of the defense lawyer in a criminal case

with a guilty client rests in his successful effort to confuse and befuddle twelve inexperienced and sentimental jurors with issues entirely foreign to the merits of the case.

In qualifying jurors in any case the lawyers should not be given the almost endless range of inquiry they are now afforded. Such examination should be confined to reasonable and sensible limits by the court and should never be allowed to embrace inquiries into the law.

The best remedy for all this lies in the improvement of the method of selecting persons for jury service. Intelligence tests, the establishment of educational standards, or some method of selecting jurors to insure reasonable capacity upon their part to discharge their duty ought to be adopted. That the statutory exemptions of persons from jury service are too sweeping can hardly be doubted.

II

Assuming that the juror is qualified to serve he is frequently baffled by the legal techniques and procedures which in no small degree baffled the lawyer until he mastered them. In criminal trials especially, the contest frequently resolves itself into one designed to create confusion rather than understanding among jurors. In them the defense hammers away at "reasonable doubt" and the "presumption of innocence," the exact content of which can never be defined with mathematical accuracy. In almost every trial legal artistry produces a host of maneuvers and subtle stratagems involved in objections to the admission or exclusion of evidence and to the court's ruling thereon. All this is climaxed by the instructions of the court to the jury upon the law to guide it in the discharge of its fact-finding function. These charges to the jury are highly technical in character and when given in stereotyped written form, as they must now be given in both criminal and civil cases, without oral elaboration on the law and without any comment on the facts, their effect, combined with that of other trial procedures, is not particularly helpful even to the intelligent layman. Bewilderment, however induced, is not conducive to the discharge by the jury of its function.

The remedies for the evils last considered would embrace, among others, the following:

(a) Oral charges upon the law should be given to the jury. These should be couched in simple and understandable language for the comprehension of the layman and should be accompanied by all the explanatory remarks that may be necessary or desirable to enlighten the jury.

(b) The right of trial judges to comment upon the evidence is frequently urged. This power is subject to grave abuse un-

less confined to proper limits and its legitimate exercise will always require measured restraint and the most scrupulous regard for the true province of the jury. Those who disapprove of a court's having this power point to the dangers to the jury system that lurk in its abuse. They also point to the sinister influences which the trial judge may exert through the modulations of his voice and through other means which the cold record will never reveal. It should be observed that the exercise of this power by federal judges as they have been admonished to use it "cautiously and sparingly, if at all, and only in exceptional cases" has been thought to be satisfactory.

(c) In the recognition of the propriety of fuller judicial control over trials there should not be overlooked that disciplinary power of the court over attorneys in their conduct during the trial. Much of the conduct of the defense lawyer in criminal trials which is deliberately calculated to confuse the jurors upon the issues of the case ought never to be tolerated. Neither should similar conduct on the part of the prosecutor be allowed to occur without reprimand.

(d) The abrogation of the unanimous verdict in both civil and criminal cases, except when the offense is punishable by death, has been put forward as a remedy for some of the inadequacies of the jury system. Such a change in the common-law jury verdict, while in full harmony with the democratic principle of majority control, is not free from constitutional obstacles. The abandonment of unanimity, however, would materially lessen the opportunity for the defense successfully to inflict upon the community the wrongs as it is now able to do through its ability by devious methods to mislead or confuse a single juror.

(e) A brief course of instruction should be given to prospective jurors to acquaint them with the nature of a trial and its procedures so that they can more intelligently appraise their own part in it. More should be done in the public school system to enlighten youth upon this important public service.

Vengeful Creditor

"I think we have allowed defendant plenty of time to make a settlement of our judgment; therefore I believe we should take him to court for *trespass of judgment*, in order get a *body execution*—to be confined to County Jail until judgment is paid by defendant. *I am willing to pay his board while in jail.*"

Contributor: Mary R. Faust, Youngstown, Ohio.

Ups and Downs of Labor Law

Address by DONALD R. RICHBERG, of Washington, D. C., to Ohio State Bar Association, Columbus, Ohio. Condensed from Ohio State Bar Association Report, May 27, 1946, Vol. 19, No. 9

IN the earlier days of the industrial revolution, huge organizations of capital carried on ruthless campaigns to destroy competitors, to suppress labor unions, and to control government. In recent days, vast labor organizations have pursued a similar course, with a similar disregard for the general welfare.

It should be made clear that it is the federal government that is largely responsible for the development of labor organizations with superman powers to advance self-interests regardless of other private interests or vastly more important public interests. The federal government has extended its intervention and control of labor relations over so large a field that state authority in this regard has been reduced to practical subserviency. Federal law has stimulated and made possible the growth of economic and political powers in labor organizations which, if unchecked, will eventually destroy the free competitive economy and the political balance of power essential to a democratic government.

The exemption of labor organizations from the restraints of the anti-trust laws began with the Clayton Act of 1914 and was emphasized, to use a mild word, in the Norris-LaGuardia Act of 1932.

The passage of the National Labor Relations Act in 1935 marked the beginning of active assistance by the federal government to all labor organizations, combined with severe restraints upon the ability of employers to oppose such organizations.

The Fair Labor Standards Act of 1938 brought the federal government into the business of determining not only minimum wages and maximum hours, but also of regulating overtime wages, a legislative error of majestic size.

The Railway Labor Act of 1926, amended in 1934, is an exceptionally impartial law. It not only provides protections for the self-organization of railway employees, but also makes it the legal duty of both employers and employees to make every reasonable effort to use peaceful means

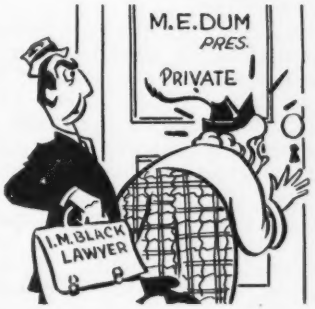
to settle their differences, and provides an adjustment machinery through which disputes can be settled by voluntary agreement or with government aid.

The foregoing laws, with others of less importance, furnished a background of federal labor legislation against which the United States moved into the complex and extraordinary problems of the Second World War. To prevent wartime stoppages of production, the National War Labor Board was created by executive order January 12, 1942, succeeding the National Defense Mediation Board created by executive order March 19, 1941.

As a matter of personal opinion, I question whether any government tribunal should include, as did the War Labor Board, avowedly partisan representatives. In a voluntary arbitration or an adjustment board set up by agreement, there is a service which may be performed by partisan members. A public tribunal may call for the assistance of partisans, although in the main I agree with the pronouncement of the late Joseph B. Eastman that partisans have their place before but not on a public tribunal.

The War Labor Board advanced the unionization of workers and definitely promoted the so-called closed shop by its "union security" or "maintenance of membership" program. It was a highly signficant devel-

Case & Comment Cartoon Contest



WHEN leafing through your favorite periodicals — and we hope that Case and Comment is one of them—did you ever have the feeling that if you tried, you could turn out better gags and cartoons than some you see in print?

If so, you now have an opportunity to try your skill. The editors of Case and Comment believe its readers possess a lot of latent humorous and artistic talent, so Case and Comment announces its own Cartoon Contest.

Cartoons should have a legal angle, and originality of thought will count more than artistic perfection. Case and Comment will pay $3.00 for each one published. No contributions can be acknowledged or returned, but payment will be made upon acceptance. All published cartoons become the property of Case and Comment. Send them to Cartoon Editor, Case & Comment, Aqueduct Building, Rochester 4, N. Y.

opment in labor law when a government tribunal, instead of limiting itself to the determination of wages and working conditions, undertook to promote the strength and authority of labor unions.

In reviewing the war period, some attention must be given to the passage and operation of the War Labor Disputes Act. This Act was passed as the result of strikes and threats of strikes which threatened to an alarming degree the successful prosecution of the war. It was a hasty and in many respects an unfortunate enactment. Nevertheless, the necessity for some legislation was clearly apparent. This Act, with all its weakness, did operate to put a little of the fear of the federal government, if not the fear of God, into some of the labor organizations and their leaders who had begun to manifest a disloyalty to national interests which, evil enough in times of peace, became quite intolerable in a time of war.

The War Labor Disputes Act also helped to dispose of one false theory, which is that a strike vote taken in advance of a dispute will register correctly the desire or unwillingness of the employees to go on strike. Anyone familiar with labor organizations should know that a strike vote is commonly regarded simply as a warrant of authority to the officers to do everything they can to force a good bargain for the employees. If the men did not vote to strike, their officers would be stripped of their best weapon. So, with practical uniformity, a vote, even by secret ballot, will favor a strike.

It might be quite a different proposition, if at the end of negotiations or after public officials had made recommendations for settling a dispute, a vote were to be taken by secret ballot as to whether the employees would favor accepting an available settlement or actually going on strike. That would be a real strike vote.

The War Labor Disputes Act also provided means for preventing the stoppage of essential production by authorizing the President to take possession of a plant or property threatened with a strike, and to operate it under the terms and conditions of employment in effect at the time of taking, unless or until the National War Labor Board ordered changes in wages or working conditions. Furthermore, the law made unlawful any strike against government operation. It can hardly be assumed that any similar law would be enacted by the Congress to prevent or to end strikes in private business in time of peace. But the question still remains as to how stoppages of production in public utility services, or other services upon which the life of the community depends, are to be prevented.

There will always be a proper

objection to compelling men to work for private employers, even at wages and working conditions fixed by government. Of course men should not be compelled individually to work. The War Labor Disputes Act permitted an individual to stop work. But since concerted action is so essential to maintain equality of bargaining ability between a powerful employer and a large number of employees, there will always be a sound objection to a law forbidding a strike for a legitimate object which is conducted by lawful methods, and which is the only recourse left to the employees against submitting to unacceptable conditions.

But this wartime act helps to show the need for legislation to establish a peace machinery through which labor disputes can be fairly settled and to require employers and employees to make use of such machinery before stopping production by the arbitrary act of one side or the other.

In the case of public utility services at least, it seems clear that, since the properties are devoted to public use and subject to public regulation as to rates and service, the law might well impose on workers accepting such employment three obligations: first, to attempt peaceful settlement of disputes; second, if unable to reach agreement, to submit the issues to an impartial arbitration; and, third, to avoid any concerted withdrawal from employment.

This principle of a legal duty voluntarily accepted might also be extended to private businesses upon which communities are wholly dependent for the necessities of life, such as the production or transportation of food or fuel. Of course it will be hotly contended that any legal pressure on employees to work for a private employer would bring about a sort of involuntary servitude. This criticism might be met by establishing temporarily a government supervision or even, in case of a non-cooperating employer, a temporary receivership, to protect public interests. The intervention of public officials to protect the public health and safety when menaced by labor disputes is certainly justified by the same legal principles under which the courts are constantly called upon to protect the private interests of investors and to enforce commercial or statutory obligations by judicial supervision or receivership.

It is hard to believe that any lawyer who still has faith in the fundamental principles of a free society will question the need for a comprehensive and drastic revision of federal labor law. A major revision has been offered in the proposed Federal Industrial Relations Act.

There is no practical or constitutional difficulty in enacting a federal law, based on age-old

and well-proven principles and methods of civil government, which will reestablish domestic tranquility and end civil warfare in the field of labor relations. No civil liberty need be denied to the wage earners. But civil liberties which organized labor now denies to the rest of the people can be restored. No freedom of association and concerted action to advance the legitimate interests of manual workers by lawful methods need be curtailed. But the economic freedom which labor unions now deny to individual workers and to business managers can be restored.

All that is needed is public understanding of the necessity to establish a rule of reason and to end a rule of force in the relations between employers and employees. The settlement of labor disputes by the medieval method of trial by combat has survived like a swollen, diseased appendix in the vitals of our economy. These constant and intensified striking pains should make it obvious that there is urgent need for a life-saving operation.

Key Question

Whether a spouse is a moron or a potential Phi Beta Kappa is a question of fact not here established, but if it had been, there is no point between these extremes where the law of Florida inhibits one from becoming a party to a marriage contract. The parties to the instant contract indulged in one year of courtship and lived together seven years, sufficient to condone and raise the statute of limitations against this contention. Assault on the marital contract based on genetics may be good on moral grounds, but it has no standing in law, and if it did it would be out of place after the banns are announced.

Terrell, J., in Gibbs v. Gibbs, Fla., 23 So.(2d) 382.

Contributed by: James G. Coston, Osceola, Arkansas.

Abstract from a Will

"I, Jonas O. Peck, residing in the city of Brooklyn, Kings County, N. Y. Minister of the Gospel and at the present time, a corresponding secretary of the Missionary Society of the Methodist Episcopal Church, being of sound mind and memory, (blessed be Almighty God) and considering the uncertainty of his *moral* life, do make, publish, and declare this my last Will and Testament, in manner and form, following:"

Contributor: Chas. C. Calkin, Kingman, Kansas.

New Style Oratory

By Ewell D. Moore
of the
Los Angeles Bar

IT appears that the old style of oratory is to be brought back. At least that is the implication in the formation of Toastmasters International, an organization with clubs scattered here and there in the United States and Canada.

We are for it. Especially if the talks are given only to the 30 club members. Perhaps it is designed to train toastmasters in more modern ways of introducing speakers at club luncheons, political dinners and picnic rallies. It will be nice to see a new style toastmaster function without using the age-old introduction that "we have with us tonight," and then go on from there to recite a lot of the stuff the guest of honor is waiting to read.

If the purpose is to educate speakers in the old-time style of oratory, they have undertaken a tough job. Oratory that used to thrill every public meeting, and sometimes make sleepy members of Congress sit up, went out with the last century. The radio gave it the kiss of death. You can't get a crowd nowadays that will sit still. These eating assemblies at luncheons and dinners simply cannot cram chicken a la king and absorb some learned paper on the use of the atomic bomb at the same time. Most of them came to eat the six-bit lunch for three dollars because they had to eat somewhere anyhow. There is always a clash between the knives and forks and the speaker.

The old time flag-waving, eagle soaring orator would have snorted contempt at audiences of thirty. Why, he could never reach the point of opening his collar and mopping his brow without the inspiration of a crowd. They didn't need to try out a speech before a committee to tell them what to say and how to say it. They could toss off a spellbinder at any time and place, and on any subject if there was a crowd to listen. The bigger the better.

The old hell-roaring orators, whose immortal words lie embalmed in a million forgotten records, are just a nostalgic memory with those of us whose youth departed with the gas age. We can argue, and with the facts in our favor, that they will never be able to get the present speed mad, restless, snake-hipped generation to listen to the impassioned declamations of a real orator on the

Condensed from Los Angeles Bar Bulletin, August, 1946

courage of our forefathers, the heroism of Paul Revere, the love of a dog for his master, or the strivings of Ulysses to get back home before Penelope surrendered to one of her many suitors.

Even pulpit oratory seems to be out of style. Gone are the hell fire and brimstone sermons of the circuit riders. Only a few of the itinerant preachers of the hill countries are left. As one of these said on the changing times: "People are gittin' eddicated too much. They want fancy talkers. Now, me, I don't know much, but I can give 'em the old religion that makes 'em rise up and holler like a panther."

Yes, oratory is a lost art. No more do we hear the inspirational speaker, like Tennessee's Senator Carmack, back in the early years of the century, who in his apostrophe to woman, said:

"It has been said that the world knows nothing of its greatest men; it surely knows nothing of its greatest women. They are all around us in the cottage and in the hovel where the lean hand of poverty breaks the ashen crust, and in the stateliest homes of luxury and pride. They are among the humblest women in the humblest homes, examples of a diviner heroism than that of Joan of Arc; heroines all unconscious of their heroism who have walked with bleeding feet the stony paths of martyrdom, unseen, unknown, and unpraised of man."

Evidently the Senator did not live long enough to have any knowledge of the doings of the overstuffed habitues of the modern night clubs throughout the land, or of the afternoon bridge clubs of these days.

It was when the old timers, especially down south, orated on the "lost cause" that they really went to town; like John Esten Cooke, who, in his panegyric to Stonewall Jackson's memory, lifted them up with this:

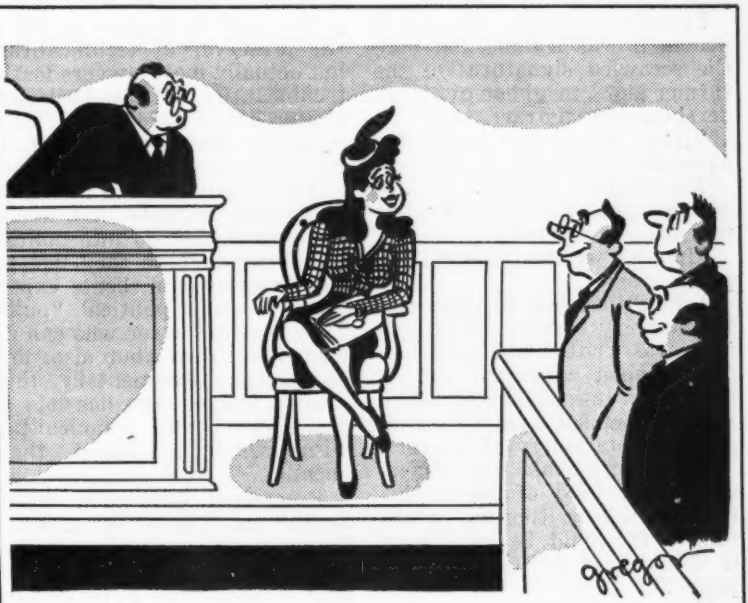
"Listen! That is the sound of a great column on the march. Hush! There is the bugle—that sound like the rushing of the wind through the forest is the charge of Stuart and his horsemen. See the banners yonder, how their splendid colors burn; how they flaunt and wave and ripple in the wind. Is that distant horsemen with his old yellow cap, in his dingy coat, his piercing eyes, the man of Port Republic and Chancellorsville? Is that burning sound the cheering of the 'foot cavalry' as they greet him? See that vivid, dazzling flash! Is it lightning or the glare of cannon? Hear the opening roar of battle like the burst of thunder! No, 'tis only a dream—the banners, the shoutings, the exultant cries of victory give place to the sad stern reality."

There was simple, unconscious oratory, too, among the old

timers. Like the old "jestice of the peace" in a mountain county of eastern Kentucky. He was called upon to "say some words" to the crowd of neighbors gathered to bury a well-known character who had been skilled in the lesser arts of gambling, drinking and chicken fighting. The old "jedge" got up with great dignity and without wasting time or words, said:

"We come to bury Uncle Jed. He growed good tobaccer and he chawed it. He raised good chickens and he fit 'em. He held good cuyards and he played 'em. He made good likker and he drunk it."

Then he paused impressively, and concluded: "Of sich is the kingdom of heaven."



"And if acquitted I promise to give each juror my telephone number!"

You, et al., Make the Shyster

By JULIUS LONG[1]

Condensed from The Rotarian, June, 1946

A FARMER walked into my office and threw a sheet of rough, yellow tablet paper on the desk. He eyed me with a knowing smile.

"This thing ain't worth the paper it's written on, is it?"

I carefully read it. Though in pencil, it was legible, and bore the scrawled signatures of the farmer and a neighbor to an understandable contract.

"What makes you think this agreement is no good?" I asked.

The farmer seemed slightly disconcerted by my question, but was still sure of himself.

"It ain't written on legal paper!"

I didn't ask him to elaborate. It was very simple. This contract was written with pencil on 5-cent tablet paper and not on the 8½-by 13-inch sheets which for some reason are the standard legal stationery of lawyers.

"It doesn't make any difference what kind of paper this contract was written on," I told him. "It would be good even if it had been written on toliet paper!"

He was flabbergasted and a little indignant. He had signed the contract thinking he could later repudiate it because of a fancied technical defect.

This naïve attempt of a layman to use to his advantage a legal technicality is common. There is a popular belief that it is the legal profession which is the preserver of technicalities, but actually most lawyers loathe technicalities. If law books are cluttered up by weasel words, it is largely due, in my opinion, to the insistence of the lay public.

Many people regard attorneys as hybrid wizards and fixers. Lawyers do not go into politics ordinarily because they like to, but because their clients expect them to have political "pull." They want a lawyer who can fix things for them, but also, and even more fundamentally, they want a lawyer who has lots of crawling little technicalities with which to infest their enemies.

Recently I watched a skilled lawyer waste all of ten minutes trying to get a simple satisfactory answer to a single question. The witness was a policeman, who had often been in a courtroom, yet could not understand that what was wanted was simply what he had seen and heard,

[1] The pen name of a practicing lawyer who prefers to remain anonymous.

not what someone else had seen and heard. After he had left the witness stand he bewilderedly asked me:

"What was I doing that was wrong?"

I explained, and he saw a great light that neither his inquisitor nor the judge had been able to reveal to him.

"Why the devil," he asked, "didn't they tell me that?"

The fact was that they did tell him clearly several times, but the excitement of being a witness before a roomful of people had paralyzed his mind. Which might suggest a revision of the rigid rules of evidence to preserve their fairness and yet eliminate the confusion that slows down trials and causes them to last days when a few hours should be sufficient.

I wonder if there lives a lawyer who will deny to himself that upon occasions he has risen to his feet with a "Your Honor, I object!" solely because he has felt it was expected of him by his client. I have. The other lawyer was objecting to everything my client's witnesses said, and I had to prove that I was on the job, too.

The truth is that frequent objections often prejudice the jurymen who think the lawyer is afraid the truth will slip out. It is equally true that by permitting the adverse witness to ramble on with inadmissible testimony, a good lawyer gives him "enough rope to hang himself," whereas many objections give him time to think and protect himself.

But clients are busy bees. They want dramatic action and buzz with whispered suggestions to prove the witness is a liar. Usually the misstatement involves but a minor point. For example, the witness testifies something happened on June 15, 1940. All along the date had been fixed as June 15, 1941. Everybody knows that, yet when this witness makes the obvious slip of the tongue, the client practically pops out of his chair with excitement, demanding cross-examination to show the whole world what a dastardly liar his opponent is.

Yes, people like the abracadabra of the courtroom. That's why we have it. And human nature is such that the typical litigant likes it because he fancies it gives him some special advantage when he needs it—if he has a smart lawyer.

Proof? Ask any lawyer.

I have known pious men to try to abrogate a contract on the ground that it was executed on a Sunday, thereby making it invalid. When told that no such technicality exists, they plainly reveal their conviction that the law is an impious thing without regard for the sanctity of the Sabbath.

I know of a government project that required a mayor of a village to sign some papers. He refused. Though the mayor

could have been mandamused into signing, that would have taken time. Finally the village solicitor took the mayor aside.

"This pen of mine is filled with green ink," he said.

The mayor winked slyly, took the pen, and signed the papers, for, like every other very smart man, he knew perfectly well that nothing was binding if signed with green ink.

Then there was the man who told me about an extremely "raw deal" he had got from his lawyer. Late one night his car had been smashed up by a car driven by a person who not only had no liability insurance, but had mortgaged it for more than its worth.

"But we had it on him," the narrator said. "It happened that this fellow was out with a dame who wasn't his wife. All my lawyer had to do was to tell him he'd bring that out in the trial, and he'd paid off quick

"That's lawyer Blalock training for the Swanson case,—the opposing attorney is an ex-pug with a terrible temper!"

enough! Do you think the shyster would do that? He would not! Imagine a lawyer letting a client down like that!"

I could imagine that without any trouble at all. If the "shyster" lawyer had heeded his client's advice, he would have risked disbarment and a possible prison sentence for extortion.

Another typical example: A man is driving down the street with his mind on important business or perhaps his eye on a pair of pretty legs. Parked unlawfully in the middle of the street is a car which has run out of gas. The driver hits the stalled car and wants his lawyer to collect damages. He is a persuasive lawyer if he can make the driver realize the doctrine of contributory negligence.

"Wasn't the guy in the wrong being there in the middle of the street?" he will indignantly ask the attorney.

"Sure he was in the wrong," is the answer, "but so were you. You should have had your car under such control as would have enabled you to stop within the assured clear distance ahead of you."

Perhaps the lawyer's logic will be appreciated; more likely the client will rant about the injustice and unfairness of a law. He has been deprived of retribution by some crazy technicality about assured clear distance! And he minces no words!

Though many inane and useless atavisms, such as the abbreviation "SS." after the name of county and state in affidavits, remain in use simply because of unexamined custom, I am convinced that most useless forms and tricky technicalities continue because of popular demand. A bill of sale recites that the grantor "does hereby grant, bargain, sell, transfer, and deliver unto the said grantee. . . ." Any one of the words used would be sufficient to pass title, but a client will show contempt for an attorney who does not shoot the works.

Admittedly, there are many unfair technical phases in the law; it is not yet perfect, and it never will be. Yet it is undergoing a continuous process of evolution—thanks to the lawyers. Their bar associations back new reforms at every meeting. Legislators respect these recommendations and are glad to sponsor them—unless they arouse the fanatical opposition of lay constituents who furiously fight any innovation suspect of depriving them of some advantage.

The evolution of the law continues not because of the layman, but in spite of him.

Patrick Henry of Red Hill...

By

HON. HAROLD C. HAGEN

Member of Congress from Minnesota

Condensed from

Liberty

A Magazine of Religious Freedom

Vol. 41, No. 3

AMERICAN liberties—our priceless possessions that have made us the envy of other nations—sprang from the grass roots.

Typical of the grass-root pioneers in the cause of American freedoms was Patrick Henry, whose immortal declaration, "Give me liberty, or give me death," etched itself into the mountainside of this "land of the free" as an eternal monument to the cause of liberty. Patrick Henry's famous utterance and his other nearly as famous declarations were not spontaneous sallies into an ethereal thesaurus or a performance of oratorical mesmerism. They were expressions of a doctrine thought out while he was grubbing stumps on virgin land or seated beside the ruins of his humble home that had been destroyed by fire.

Patrick Henry was not a man of letters. He was a man of reason and possessor of a degree in human understanding. He was born on May 29, 1736, to Colonel and Mrs. John Henry on the estate called Studley, in Hanover County of the colony of Virginia. Patrick was one of nine children. His parents were not wealthy. As a matter of fact, his father had come into the colony only a few years before Patrick's birth to "seek a fortune." When Patrick was a few months old, the family moved to Mount Brilliant about twenty-two miles south of Richmond. Even the old-fashioned country schools, as our parents knew them, did not exist then. Pay schools were far apart, and there were many "private" teachers. Without any particular qualifications a man could put some benches in a room, cut a lively hickory branch, hang out a sign reading "John Doe, Teacher," and then wait for the customers to come in. Patrick Henry went to such a school until he was ten years old.

The elder Henry was reported to have been a man "of a very liberal and extensive education." Patrick was taken out of school at the age of ten, and his father

became his sole tutor. Colonel Samuel Meredith, who married one of Patrick's sisters, once declared for the record that through the elder Henry, Patrick "acquired a knowledge of the Latin language and a smattering of the Greek. He became well acquainted with the mathematics, of which he was very fond. At the age of fifteen he was well versed in both ancient and modern history."

The young Patrick is known to have loved the out-of-doors. He spent much time there in his boyhood. Hunting and fishing were his pastimes. Yet he found time to learn to play the flute and the fiddle. During this time, of course, Patrick had his chores to carry out on the grass roots of Mount Brilliant.

He was thrown in contact with the countryside folks at the age of fifteen when his father found employment for him in a country store in the neighboring settlement. Here Patrick had an opportunity to listen and learn. News brought in by the ships and word from the colonies to the north all passed through the country store. Patrick was to learn the business. Instead he learned from the grass roots what the people of the New World were thinking. He heard them talk, sometimes in hushed tones, of the mother country across the Atlantic. Trade and regulations were aired by those who gathered in the store.

After a year of apprenticeship his father purchased a stock of goods and set up Patrick and his brother William in a grocery business of their own. A historian has said that to Patrick the store was a school of human nature. The schoolmaster was a cruel one, however, because the charge-account books of the Henry boys' store were full of promises to pay and the shelves barren of commodities. The first business enterprise of young Patrick collapsed after a year of struggle.

At the age of eighteen he wooed and won Sarah Shelton, daughter of John Shelton. With the hand of the bride came six Negroes and three hundred acres of poor land, plus some stock and other gifts from the Henry household. During these months of sweat and toil at Pine Slash, as his place was called, the young bridegroom learned patience the hard way. Three years after their marriage fire swept away the possessions of the newlyweds, and Patrick's second venture vanished in thin air.

From the sale of some of his slaves—and historians say that Henry had some firm convictions on the score of the evils of slavery—he scraped together enough money to again venture forth in the business world, and he opened another grocery store. Here he again inhaled the wisdom of the countryside. In 1758 hard times hit the colony, and the next year failure hit the to-

bacco crop. The following year failure moved in on Patrick, and he gave up the grocery business. As Thomas Jefferson put in, in writing of his first meeting with Patrick, "Mr. Henry had, a little before, broken up his store—or, rather, it had broken him up; but his misfortunes were not traced, either in his countenance or conduct." On that occasion of meeting, when Jefferson stopped at Hanover on his way to William and Mary College, he appeared to Jefferson as follows: "His manners had something of courseness in them; his passion was music, dancing, and pleasantry. He excelled in the last, and it attached everyone to him."

Henry wrote that "adversity toughens manhood," but he had by no means become calloused, and was ready for a new adventure. This time it was law. He borrowed a copy of *Coke upon Littleton,* the forerunner of Blackstone, and pored over its pages. Historians differ as to the length of time he spent in preparation before he presented himself at Williamsburg for admission to the bar. Some say the time was as short as six weeks. Others put the maximum as a matter of months.

It was on the occasion of his examination that the product of his grass-roots reasoning first cropped out. Patrick related the account himself to a friend, Judge John Tyler, later in life. He was being examined by John Randolph, who was not too well impressed with the candidate's appearance. Questioning Patrick on common law, Randolph took exception to Henry's views and developed an argument. He definitely and purposely put young Patrick on the defensive. After the debate, as Henry related the account to Judge Tyler, "he (Randolph) said, 'You defend your opinions well, sir, but now to the law and the testimony.'" With that they entered Randolph's office, where, according to Patrick's account, Randolph said, "Behold the force of natural reasons; you have never seen these books, nor this principle of the law; yet you are right and I am wrong; and from this lesson you have given me (you must excuse me for saying it) I will never trust to appearances again. Mr. Henry, if your industry be only half equal to your genius, I augur that you will do well and become an ornament and an honor to your profession."

In March, 1764, the British Parliament passed its resolutions leading up to the Stamp Act, which passed in January, 1765. The country was buzzing with excitement. A member of the House of Burgesses in Virginia resigned to take another office and make way for Henry to enter the House. Henry was admitted to the colonial legislature in May, 1765. The Fire of Freedom was burning in his soul, and the matter of "seniority" was

unknown to him in the matter of debate on the Stamp Act. After listening to the older members from the point of service (Washington and Jefferson were among the members of the House of Burgesses), Henry introduced his famous set of resolutions.

Sealed among his personal effects after his death was one document on which appears, in his handwriting, these words, "Inclosed are the resolutions of the Virginia assembly in 1765, concerning the Stamp Act. Let my executors open this paper." The resolutions were in Henry's handwriting. Reciting the contents of the two royal charters which, it was pointed out, gave the colonists the privileges and liberties of those who had been born and were abiding within the realm of England, two of the five "resolves" dwelt particular-

"But that prosecutor never got the best of me,—everytime he asked me a question I came back with a snappy answer!"

ly on freedom, one declaring, "That the taxation of the people by themselves, or by persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, and the easiest mode of raising them, and are equally affected by such taxes themselves, is the distinguishing characteristic of British freedom, and without which the ancient constitution cannot subsist," and the other that "Resolved, therefore, That the general assembly of this colony have the sole right and power to lay taxes and impositions upon the inhabitants of this colony; and that every attempt to vest such power in any person or persons whatsoever, other than the general assembly aforesaid, has a manifest tendency to destroy British as well as American freedom."

There is some controversy over whether the House of Burgesses met the next day and expunged the latter resolution from the record. Henry left town the night they were approved, and after another of his historic speeches wherein he declared, "Tarquin and Caesar had each his Brutus, Charles the First his Cromwell, and George the Third————" here the pause that produced shouts of "Treason"—then he calmly continued—"may profit by their example! If this be treason, make the most of it."

Henry's attempt to be modest in his account of what happened only magnifies the power radiated by a lone individual speaking as a voice in the wilderness for a cause he feels is just. On the back of the papers left for the executors, Henry had written the story of the happening in the House of Burgesses that day. Said he in part, "All the colonies, either through fear, or want of opportunity to form an opposition, or from influence of some kind or another, had remained silent. I had been for the first time elected a burgess, a few days before, was young, inexperienced, unacquainted with the forms of the house, and the members that composed it. Finding the men of weight averse to opposition, and the commencement of the tax at hand, and that no person was likely to step forth, I determined to venture, and alone and unadvised, and unassisted, on a blank leaf of an old law book wrote the within."

In conclusion he said, with respect to his resolutions, "This brought on the war, which finally separated the two countries, and gave independence to ours. Whether this will prove a blessing or a curse will depend upon the use our people make of the blessings which a gracious God hath bestowed upon us. If they are wise, they will be great and happy. If they are of a contrary character, they will be miserable. Righteousness alone can exalt them as a nation."

Patrick Henry's speech at the Richmond Convention is well known to every American, and the famous words he uttered have been memorized by every school child.

"Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me—give me liberty, or give me death!"

Then, as in other great moments in his life, Patrick Henry seemed to rise as a minority, speaking out for right. Speaking from the grass roots.

"Sure I can take a letter, where do you want me to take it?"

Among the New Decisions

Attorneys' Fees—*action on injunction bond.* Judge Rossman wrote the opinion in Kern v. Gentner, — Ore —, 164 ALR 1077, 159 P2d 190, which held that fees for services performed by the defendant's attorney upon an appeal by the plaintiff in an injunction suit from a judgment dismissing the plaintiff's complaint for injunction, dissolving a preliminary injunction theretofore issued, and granting defendant's cross prayer for injunction against the plaintiff, which appeal resulted favorably for the defendant, are not recoverable as damages in an action on the injunction bond conditioned for the payment of such damages as the defendant might sustain by reason of the injunction if the same be wrongful or without sufficient cause, the defendant having taken no steps to have the temporary injunction dissolved before the hearing on the merits in the court below.

The point annotated in 164 ALR 1088 is "Attorneys' fees as element of damages allowable in action on injunction bond."

Blood Tests—*privilege against self-incrimination.* Judge Bailey wrote the opinion in State v. Cram, — Ore —, 164 ALR 952, 160 P2d 283, which held that the introduction in evidence in a criminal prosecution for manslaughter in driving an automobile while intoxicated, of testimony as to the presence of alcohol in a sample of blood taken from the accused after his arrest, while he was unconscious, does not violate a constitutional provision against self-incrimination, the sample having been obtained without the use of any process against him as a witness, and his testimony not having been required to establish the authenticity, identity, or origin of the blood.

The point annotated in 164 ALR 967 is "Requiring submission to physical examination or test as violation of constitutional rights."

Building and Construction Contract — *specific performance of.* Judge Rossman wrote the opinion in McDonough v. Southern Oregon Mining Co. — Ore —, 164 ALR 788, 159 P2d 829, 161 P2d 786, which held that specific performance may properly be decreed of covenants in a lease of the right to work gold-bearing gravel under the surface of plaintiff's farm, to leave a straight creek channel, to level the tailings, and to replace topsoil, where such work requires the use of heavy machinery which defendant has and the plaintiff does not have and cannot get, and the work if not done by using heavy machinery would cost more than the restored land would be worth.

The point annotated in 164 ALR 802 is "Specific performance of contracts requiring building or construction."

Building Contractor — *subrogation of surety.* Judge Steinert wrote the opinion in North Pacific Bank v. Pierce County, — Wash2d —, 164 ALR 602, 167 P2d 454, which held that an assignment by a public contractor to a bank of funds to become due under the contract as security for advances, notice being given to the debtor-county of the assignment, is entitled to priority, with respect to amounts earned under the contract before default, over a covenant of assignment in the application for the contractor's bond which, although dated before the assignment to the bank, is conditioned upon the occurrence of a default by the contractor, the contractor having defaulted and the work having been completed by the surety, where no notice is given to the county of such covenant of assignment, and the county is not required to retain any of the funds due under the contract except a small amount required by statute.

The point annotated in 164 ALR 613 is "Right of building contractor's surety who completes contract to money earned by contractor but unpaid before default."

Commissions — *broker's right to upon joint purchase.* Judge Wennerstrum wrote the opinion in White v. Grovier, — Iowa —, 164 ALR 943, 21 NW2d 769, which held that a real-estate broker should be found entitled to a commission on the entire purchaser price of real estate sold at the asking price where although the purchaser interested by him associated himself in making the purchase with an-

other and each took a separate conveyance of part of the property, he became jointly obligated with such other by the contract of purchase for the entire purchase price.

The point annotated in 164 ALR 949 is "Broker's right to compensation as affected by the fact that customer procured by him joined with another in the purchase of the property involved."

Contracts — *delay in removal under timber contract.* Judge Wyatt wrote the opinion in Felder v. Oldham, 199 Ga 820, 164 ALR 415, 35 SE2d 497, which held that the outbreak of war and the consequent shortage of labor, occurring subsequently to the execution of a timber contract specifying the time within which the purchaser was to remove the timber from the land, does not entitle the purchaser to an extension of time in which to remove the timber beyond the time limitation contained in the contract.

The point annotated in 164 ALR 423 is "Rights of parties to a timber contract upon failure of purchaser to remove the timber within the time fixed or within a reasonable time."

Damages — *effect of failure to claim right to possession in replevin action.* Judge Beals wrote the opinion in Hoff v. Lester, — Wash2d —, 164 ALR 751, 168 P2d 409, which held that in determining whether plaintiff in a replevin action should have mitigated his damages for the detention of his property by availing himself of the statutory right to obtain possession by filing a bond, the court should consider all relevant and material facts, including the expense connected with such a procedure, the financial ability of the plaintiff to bear such expense, the relation between such costs and the amount of damages claimed by the plaintiff, the matter of whether or not any bond filed by plaintiff would be met by a counter bond filed by the defendant, and an estimate of the probable time within which a judgment in the action, determining the title of the property, would be entered.

The point annotated in 164 ALR 758 is "Right of plaintiff in replevin to damages for detention of property during pendency of action as affected by his failure to claim immediate possession by complying with statutory provisions in that regard."

Default Judgment — *mistake of judge or clerk.* Judge L. A. Smith, Sr., wrote the opinion in Gardner v. Price, — Miss —, 164 ALR 532, 25 So2d 459, which held that a default judgment entered by a justice of the peace is void where counsel for the defendant had agreed with the justice to continue the cause until a later date, although this agreement was not made in open court, where the date of entry of

the judgment, although a regular court day of the justice court, fell within a term of the circuit court, and it was the custom among lawyers and magistrates of the county, where a trial before a justice of the peace was set for a day while the circuit court was in session, to have the trial automatically continued until after the adjournment of the circuit court, since in such a case the defendant, being lulled and misled by the agreement into waiting until the later date, would, if the judgment were allowed to stand, be unfairly deprived of the opportunity of making a defense to the action.

The point annotated in 164 ALR 537 is "Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for relief from judgment."

Divorce and Separation — *injunction pendente lite.* Judge Turner wrote the opinion in Re Cattell, 146 Ohio St 112, 164 ALR 312, 64 NE2d 416, which held that in an action for divorce, custody of children, and alimony, the Common Pleas Court is authorized, under General Code, § 11,876, providing generally for the issuance of temporary restraining orders when it appears by the petition that the plaintiff is entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or the continuance of some act, the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff, to issue an order of injunction restraining the defendant husband from molesting and interfering with the plaintiff and her control and direction of the children, and from interfering with her exclusive use and occupancy of her home by removing the defendant therefrom during the pendency of the action, where the verified petition of the plaintiff contains allegations of fact sufficient to entitle the plaintiff to the relief granted.

The point annotated in 164 ALR 321 is "Injunction pendente lite in suit for divorce or separation."

Divorce and Separation — *validity of agreement as to financial burden.* Judge Cheadle wrote the opinion in Stefonick v. Stefonick, — Mont —, 164 ALR 1211, 167 P2d 848, which held that an antenuptial agreement that in event either party should institute an action for divorce the party bringing such action will pay all expenses incurred therein and that the other party shall never be called upon to pay alimony, separate maintenance, costs of suit, or any other expense incurred by the party bringing the action, is contrary to public policy where the property settlement made thereby is inadequate to provide

money for the wife's support and for the expense of a divorce action.

The point annotated in 164 ALR 1236 is "Validity and effect of antenuptial or postnuptial agreement placing financial burden of suit upon spouse seeking divorce or separation."

Driveway — *as appurtenant easement.* Judge North wrote the opinion in Milewski v. Wolski, 314 Mich 445, 164 ALR 998, 22 NW2d 831, which held that a cement driveway between houses on adjoining lots, centered on the dividing line, is, though a visible, not a continuous easement which on sale of one of the lots by the owner of both properties will pass as appurtenant.

The point annotated in 164 ALR 1001 is "Roadway or pathway used at time of severance of tract as visible or apparent easement."

Elections — *liability for personal injury at voting place.* Chief Justice Maxey wrote the opinion in Kraeling v. Dormont, 352 Pa 644, 164 ALR 470, 44 A2d 274, which held that a county is not liable for injuries sustained by a voter in consequence of the condition of a polling place selected by the county board of elections, since in conducting the election it is exercising a governmental function, for negligence in the discharge of which a county is not liable.

The point annotated in 164 ALR 472 is "Municipal liability for injury to voter in consequence of condition of polling place."

Executors and Administrators — *ancillary distribution of insolvent estate.* Chief Justice Weygandt wrote the opinion in Re Hirsch, 146 Ohio St 393, 164 ALR 761, 66 NE2d 636, which held that where a decedent's estate is insolvent, the ancillary administrator should pay local unsecured creditors only their pro rata share of the domiciliary and ancillary assets, and remit any balance to the domiciliary administrator.

The point annotated in 164 ALR 765 is "Basis of distribution among decedent's unsecured creditors, of ancillary assets where entire estate or ancillary estate is insolvent."

Executors and Administrators — *retainer for debt of heir.* Judge Murphy wrote the opinion in Meppen v. Meppen, 392 Ill 30, 164 ALR 712, 63 NE2d 755, which held that an executor may apply a legacy in his hands to the indebtedness of the legatee to the estate, by reason of the interest the testator has in the personal assets.

The point annotated in 164 ALR 717 is "Right of retainer in respect of indebtedness of heir, legatee, or distributee."

Executors and Administrators — *statutes specifying appoint-*

ment. Judge Collins wrote the opinion in Schaumloeffel v. Schaumloeffel, — Md —, 164 ALR 840, 46 A2d 692, which held that a statute giving to residuary legatees a preference in the grant of letters of administration over all except a widow, male residuary legatees being preferred over females, must be strictly obeyed, and where an executor is removed on the ground of mental incompetency, the orphans' court is under a duty to appoint as administrator d.b.n., c.t.a., a son of the testator named as one of the residuary legatees, although his interest is a remainder interest only.

The point annotated in 164 ALR 844 is "Construction and application of statutes relating specifically to preferences in appointment as administrator with the will annexed."

Forgery — *presumption by possession of forged paper.* Judge Chambliss wrote the opinion in McGhee v. State, — Tenn —, 164 ALR 617, 189 SW2d 826, which held that possession of a forged check payable to the possessor, where unexplained, raises a presumption that he knowingly uttered it.

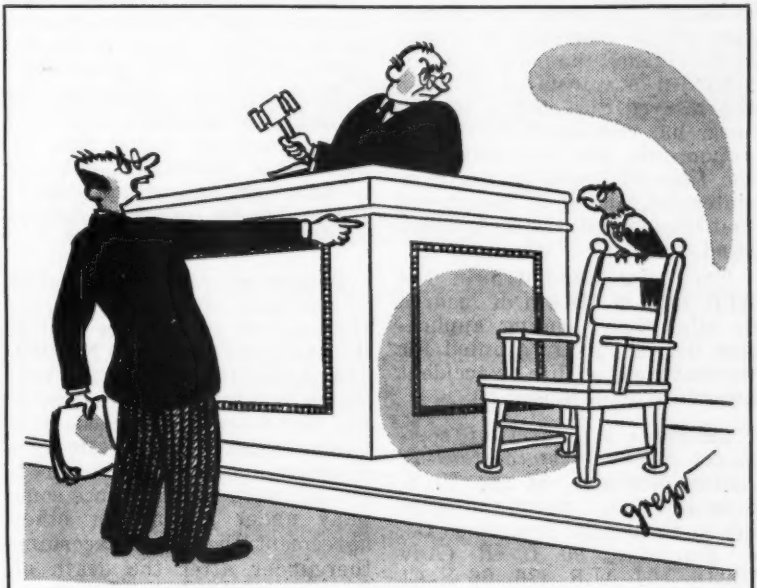
The point annotated in 164 ALR 621 is "Presumptions and inferences in criminal cases from unexplained possession or uttering of forged paper."

Guardian and Ward — *guardian's appearance without summons.* Judge Latimer wrote the opinion in Rosenberg v. Bricken, — Ky —, 164 ALR 525, 194 SW2d 60, which held that service of process on a guardian ad litem is not essential under the Kentucky statute providing that, in suits against infants where certain persons are plaintiffs, "it shall . . . be the duty of the clerk of the court to appoint a guardian ad litem for the infant, and the summons shall be served on such guardian;" and the guardian ad litem may waive the service and enter his appearance, thereby bringing the infant defendant before the court, since the guardian ad litem has already been sufficiently notified of the action through the notice of his appointment.

The point annotated in 164 ALR 529 is "Appearance by guardian ad litem without service of summons."

Income Taxes — *income from partnership with wife.* Justice Black, of the U. S. Supreme Court, wrote the opinion in Commissioner of Internal Revenue v. Tower, 90 L ed (Adv 559), 164 ALR 1135, 66 S Ct 532, which held that findings of the Tax Court of the United States, in sustaining a deficiency assessment of income tax against a husband on his wife's share of the earnings of a family partnership, that there was no real partnership between them, that all the income was in fact earned by the husband, and that the

wife received her share only by reason of the marital relationship, are supported by the evidence, where it is shown that, the business originally being a corporation owned and controlled almost exclusively by the husband, he made a gift of a large block of stock to his wife, on which a gift tax was paid, the corporation being then dissolved and a partnership formed, to which the wife contributed the amount of the stock given her by her husband, and it further appears that the business continued as before under the control of the husband, who drew no salary, the wife, as a limited partner, being prohibited from participation in the conduct of the partnership, and in fact taking no part in the business, and that her share of the earnings was used, as before, for family purposes.



"Your honor,—would you kindly advise the witness to confine his answers to a simple 'yes' or 'no'?"

The point annotated in 164 ALR 1144 is "Wife's share of income of partnership of which husband is also a member as taxable to husband or wife."

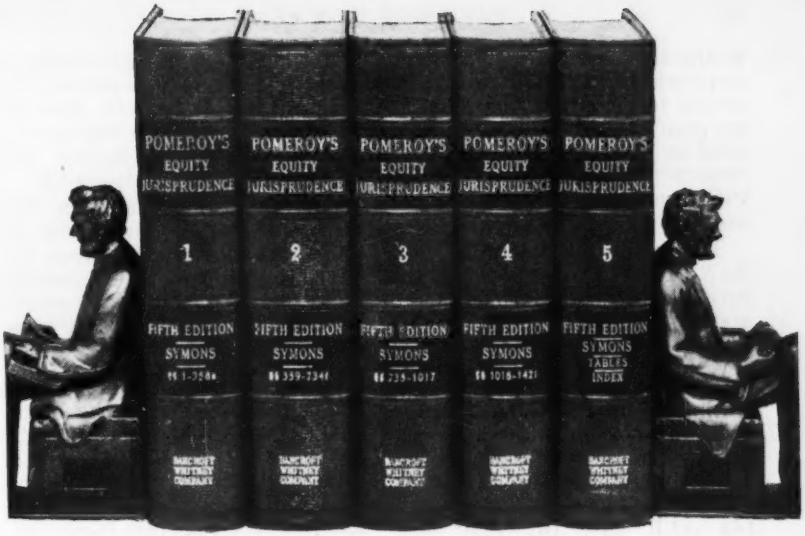
Insurance — *death of insured pending application.* Judge Wolfe wrote the opinion in Gressler v. New York Life Insurance Co. — Utah —, 164 ALR 1047, 163 P2d 324, which held that if an insured entitled to reinstatement of a life insurance policy upon production of evidence of insurability satisfactory to the insurer furnishes such evidence, the policy must be regarded as reinstated although the insured dies before the insurer has completed its investigation into his insurability at the time of applying for reinstatement, and it is immaterial that the insured died by his own hand.

The point annotated in 164 ALR 1057 is "Death of insured or other loss pending application not effectively granted for reinstatement of life or accident insurance after lapse."

Insurance — *effect of commerce clause on state statutes.* Justice Rutledge, of the U. S. Supreme Court, wrote the opinion in Prudential Insurance Co. v. Benjamin, 90 L ed (Adv 1023), 164 ALR 476, 66 S Ct 1142, which held that the business of insurance constitutes interstate commerce and does not preclude a state from imposing upon foreign insurance companies as a condition of admission to do business in the state a tax not required of domestic insurers, based upon the premiums received from business done in the state, without reference to its interstate or local character, where such tax has not prevented foreign insurers from competing with local insurers and Congress has declared that the continued regulation and taxation by the several states of the business of insurance is in the public interest and that such business shall be subject to laws of the several states which relate to its regulation or taxation.

The point annotated in 164 ALR 500 is "Decision of United States Supreme Court that insurance is interstate commerce as affecting state statutes relating to foreign insurance companies."

Insurance—*exempting claims of creditors.* Judge Lewis wrote the opinion in Genesee Valley Trust Co. v. Glazer, 295 NY 219, 164 ALR 911, 66 NE2d 169, which held that a statute providing that when the proceeds of a life insurance policy, becoming a claim by death of the insured, are left with the insurance company under a trust or other agreement, the benefits accruing thereunder after the death of the insured shall not be transferable nor subject to commutation or encumbrance, or to legal process except in actions to recover necessaries, if the parties



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to the trust or other agreement so provide, is to be liberally construed to effectuate the humane purpose embodied, and so applied as to give the exemption it creates a meaning consistent with the policy behind the statute.

The point annotated in 164 ALR 914 is "Proceeds of life insurance left with insurer after maturity of policy as subject to claims of creditors of beneficiary."

Limitation of Actions — *judgment in another state as bar to action.* Judge Carter wrote the opinion in Western Coal & Mining Co. v. Jones, 27 Cal2d 819, 164 ALR 685, 167 P2d 719, which held that dismissal of an action on the ground that there was no sufficient acknowledgment to toll the statute of limitations is not res judicata in an action in a sister state on the same obligation.

The point annotated in 164 ALR 693 is "Judgment for defendant based on the statute of limitations as bar to maintenance of action in another state."

Lis Pendens — *renewal of litigation after dismissal.* Judge Seawell wrote the opinion in Goodson v. Lehmon, 225 NC 514, 164 ALR 510, 35 SE2d 623, which held that where litigation is renewed within the permissive period after dismissal, reversal, or nonsuit otherwise than on the merits, and there is identity of causes of action, the original lis pendens is effective as against one purchasing the property involved during the pendency of the original suit.

The point annotated in 164 ALR 515 is "Original notice of lis pendens as effective upon renewal of litigation after dismissal, reversal, or nonsuit, reserving right to begin another proceeding."

Living Trust — *validity.* Judge Stearne wrote the opinion in Re Shapley, 353 Pa 499, 164 ALR 877, 46 A2d 227, which held that a trust to pay the income for life to the settlor, who also reserved the right to revoke, alter, and amend, and at the settlor's decease to transfer the corpus to named beneficiaries, is not testamentary in character because of a reserved right to withdraw principal.

The point annotated in 164 ALR 881 is "Validity of trust created by nontestamentary instrument reserving to settlor power and right to withdraw, consume, or dispose of principal."

Mistake or Fraud — *avoidance of release.* Judge Hand, of the U. S. Circuit Court of Appeals, Second Circuit, wrote the opinion in Ricketts v. Pennsylvania Railroad Co. 164 ALR 387, 153 F2d 757, which held that a general release, given by an injured railroad dining-car, waiter of all claims against the

railroad company, including claims under the Federal Employers' Liability Act for personal injuries sustained in the employment of the railroad company, which he signed at the request and direction of his attorney, relying upon the attorney's statement that it related only to his claim for wages and tips, is invalid and may be avoided by the employee, where the attorney was employed merely to collect wages and tips concerning which the employee had been unable to reach a satisfactory agreement with the railroad claim agent.

The point annotated in 164 ALR 402 is "Avoidance of release of claim for personal injuries on ground of mistake or fraud respecting the nature of the claim covered."

Negligence — *manufacturer's liability to consumer.* Judge Lummus wrote the opinion in Carter v. Yardley & Co. — Mass —, 164 ALR 559, 64 NE2d 693, which held that the absence of contractual relationship between the manufacturer of perfume and a user who suffered a burn when she applied it to her skin does not preclude a recovery if the injury was one which might reasonably have been anticipated.

The point annotated in 164 ALR 569 is "Manufacturer's liability for negligence causing injury to person or damage to property, of ultimate consumer or user."

Options—*time of exercise of option to terminate.* Judge Stone wrote the opinion in Bennett's, Inc. v. Krogh, — Colo —, 164 ALR 1010, 168 P2d 554, which held that under a contract granting the privilege of collecting garbage from the plaintiff's cafeterias for a term of five years, which reserved to the plaintiff the option of canceling the contract at the end of six months upon giving thirty days' notice, notice and attempted cancelation after a delay of fourteen months beyond the time provided in the contract is, as a matter of law, not within a reasonable time, even under a construction of the contract which would authorize cancelation within a reasonable time after termination.

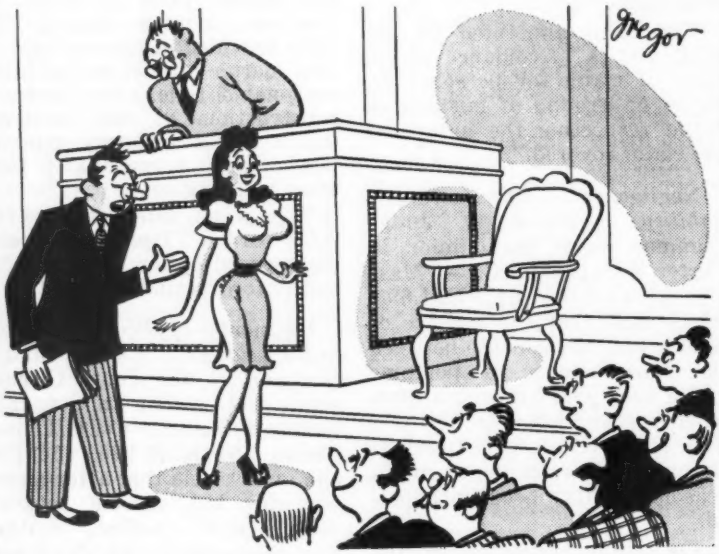
The point annotated in 164 ALR 1014 is "Time for exercise of reserved option to terminate, cancel, or rescind contract."

Payment—*application to disputed claims.* Circuit Judge Huxman, of the Tenth Circuit, wrote the opinion in Standard Surety & Casualty Co. v. United States, 164 ALR 935, 154 F2d 335, which held that after a controversy has arisen between debtor and creditor, neither may designate to which of several debts a previous payment should be applied, since to permit one of the parties to gain an

undue advantage in their controversy would be inequitable.

The point annotated in 164 ALR 940 is "Application of payment as between disputed and undisputed claims."

Public Office—*what is vacancy in.* Chief Justice Maltbie wrote the opinion in State ex rel. McCarthy v. Watson, 132 Conn 518, 164 ALR 1238, 45 A2d 716, which held that if by constitutional provision or valid statute a definite term is established for an office without provision that the incumbent shall continue in office after its expiration, he will, in holding over, be a de facto and not a de jure officer, and a vacancy will result which may be filled by the appointment, under proper authority, of a successor; if, however, the term of office is not only for a definite time but until a successor is appointed and qualified, an incumbent holding over is a de jure officer and unless, from the particular language of the



"Gentlemen, here are all the exhibits involved in the case!"

statute or the particular circumstances of the case, a different legislative intent appears, there is no vacancy in the office within a provision authorizing an appointment in such a contingency.

The point annotated in 164 ALR 1248 is "Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for fixed term and until successor is appointed or elected is holding over."

Public Officers — *appropriation by fixing salary.* Judge LaPrade wrote the opinion in McDonald v. Frohmiller, — Ariz —, 164 ALR 922, 163 P2d 671, which held that a statute authorizing and requiring the appointment of an assistant by a public officer, in providing that he shall receive a salary of a stated amount per year, is to be regarded as making a continuing appropriation for the payment of such salary, regardless of how the officer is chosen or of the fact that his term of office is not limited.

The point annotated in 164 ALR 928 is "Statutory provisions creating office and fixing salary as a continuing appropriation."

Res Judicata — *construction of instrument.* Commissioner Stanley wrote the opinion in Hays v. Sturgill, 302 Ky 31, 164 ALR 868, 193 SW2d 648, which held that the judgment in an ac-

tion for the construction of a deed with respect to the estate conveyed is not a bar to a subsequent action between the same parties to determine its validity.

The point annotated in 164 ALR 873 is "Judgment based on construction of instrument as res judicata of its validity."

Sales — *liability for defective article to intervening buyer.* Judge Chambliss wrote the opinion in Ford Motor Co. v. Wagoner, — Tenn —, 164 ALR 364, 192 SW2d 840, 852, which held that where an automobile manufacturer, having discovered that a jolt might disengage the catch provided to hold down the spring-operated engine cover, sent an auxiliary safety catch to its distributors with instructions to install it on all cars without charge, the refusal of a salesman in the employ of a distributor to have one installed on his car, which he subsequently sold to a third person, breaks the causal connection between the negligence of the manufacturer and an injury sustained by an occupant of the car in a collision which occurred when the cover flew up, obscuring the driver's vision.

The point annotated in 164 ALR 371 is "Intervening purchaser's knowledge of defects in or danger of article, or failure to inspect therefor, as affecting liability of manufacturer or dealer for personal injury or property damage to subsequent purchaser or other third person."

Street Intersection — *failure to obey traffic sign or signal.* Judge Carter wrote the opinion in Kirk v. Los Angeles Railway Corp. 26 Cal2d 833, 164 ALR 1, 161 P2d 673, which held that it is incumbent upon the operator of a streetcar, before starting to cross a busy street intersection, upon a change of the signal controlling traffic at the intersection, to allow a reasonable time for the street to clear of pedestrians who have started across the street with the signal in their favor but have been caught in the intersection by the change of signals.

The point annotated in 164 ALR 8 is "Liability for accident at street or highway intersection as affected by reliance upon or disregard of traffic sign, signal, or marking."

Support and Maintenance — *wife or child's right to set aside fraudulent conveyance.* Judge Holden wrote the opinion in Petty v. Petty, — Idaho —, 164 ALR 520, 168 P2d 818, which held that the claim of a minor child against its father for support, being based on a statutory obligation, need not be reduced to judgment before such child can question the validity of a conveyance by the father as being in fraud of such claim, where a statute provides that every transfer of property with

intent to delay or defraud any creditor "or other person" of his demand is void against all creditors of the debtor and their successors in interest.

The point annotated in 164 ALR 524 is "Right of wife or child by virtue of right to support to maintain action to set aside conveyance by husband or parent as fraudulent, without reducing claim to judgment."

Verdict — *court's questioning jury as to form.* Judge Boyles wrote the opinion in Re Sorter, 314 Mich 488, 164 ALR 985, 22 NW2d 767, which held that a judge may properly interrogate a jury returning a verdict in a will contest that testatrix "was incompetent," as to whether they mean "mentally incompetent," where the jury had been instructed that the only question for their determination was whether the testatrix was mentally competent to make a will.

The point annotated in 164 ALR 989 is "Propriety of court questioning jury as to meaning of their verdict, or for purpose of correcting it in matters of form."

The Defense

The Game Warden for Grant County, Indiana, heard a shot in the woods and rushed over and caught a boy picking up a squirrel at the foot of a tree. Before the Mayor of Gas City, Indiana, he was charged with shooting squirrel out of season. This was his defense. "Well Suh, yu Hono! I didn't shoot dat squirrel, and I's not guilty." The Judge then replied, "Well, my good man, tell me what happened." To which the boy answered. "Well, Suh, yu see I was out shootin' crows and I shot at a crow up in dat tree and dat squirrel must hav' been up dere foolin' with dat crow where he had no business and got in the way of 'd shot."—"Case dismissed," said the Judge.

Contributor: C. L. Garrison, Marion, Indiana.

Obedience

A boy was a witness in court, and the lawyer said:
"Did anyone tell you what to say in court?"
"Yes, sir."
"I thought so. Who was it?"
"My father, sir."
"And what did he tell you?"
"He said the lawyers would try to get me all tangled up, but if I stuck to the truth, I would be all right."

—*The Cash Year.*

The Effect of War on International Law

By PROF. EDWIN BORCHARD
Yale University Law School

Condensed from The Journal of International Law, July, 1946

THE time has come when the effect of the so-called Second World War on international law and relations must be assessed.

Perhaps the most serious inroad upon international law has been the purported abolition of neutrality, which has been under way since the organization of the ill-fated League of Nations in 1919. In thirty years the builders of the new era purport to have broken what it took over 400 years to build. It will probably long be debated how it was possible to bring such an unmanageable entity as the national state under the restraint of external law. The answer seems simple. Self-interest and practice from the 15th to the 19th centuries were deemed self-evident elements in persuading nations that they could stay out of war with dignity and under law. Self-preservation usually dictated neutrality.

The fact that merchant ships are now sunk at sight by submarines or, if in port, that they are requisitioned, has minimized the function of prize courts. With the exception of the *Appam* case, which was not a capture by the United States, there has been no prize case in American courts since the Spanish American War. On February 2, 1946, it was announced that the United States had sunk by submarine 1,944 major Japanese merchant vessels and that 276,000 Japanese were drowned, the Navy making an official admission that the United States had by this fact violated the London Treaty of 1930. We are now informed that in the light of the bombing airplane accompanied by the vague "total war," the time-honored distinction between combatants and no-combatants has probably disappeared, thus terminating another safeguard for the preservation of law.

A second feature of the so-called Second World War, and particularly of the United Nations Organization, is that it invites universal intervention as

the road to peace. One might assume that the supposition that all the Great Powers would see matters in the same light is a delusion which would have been exploded by this time. Not so. Only the event can make it clear that the theory of universal intervention not only strikes at the roots of international law and relations but is ineffective in practice, because it so happens that the Great Powers will rarely see the same way on important matters. It is just as likely that the United Nations Organization will make for war as for peace, since their conflicts do not leave the relations among nations unaffected.

Like the League, the United Nations should not have been assigned the inappropriate task of preserving the peace, especially by force. That impossible task seems likely to affect the valuable non-political functions which the Social and Economic Council is equipped to perform. Hence it seems unfortunate to make the Court of International Justice depend on the life of UN.

The main trouble with the theory of universal intervention has been its attempted substitution of the doctrine of subordination for the doctrine of coördination. It was actually believed that the state could be made, like the individual, subordinate to a central authority. Hence the effort to create a general authority which should have jurisdiction over the members. This proved impossible of achievement without a substantial surrender of sovereignty, which no state seems willing to make. It has, however, resulted in the assumption that the force of the leading Powers would prevail over all the other Powers of the world. The difficulty is that the Big Three are not united and cannot be, and that the small States become appendages or satellites of the larger states in geographical proximity.

The difficulty with the one-world theory is that its proponents hardly seem to believe in it, and justifiably so. Because if the theory were sound the United States would be in the depths of a depression caused by the European and Asiatic devastations, the climate all over the world would have to be the same and the peoples the same.

If we look at the Potsdam Declaration, which indicates the lines along which the new treaty of peace is to run, we are struck by the fact that it purports to abolish the long-established distinction between private and public property, and appropriates private property in liquidation of national claims. This is an innovation or retrogression likely to have far-reaching effects. It would be a mistake to attribute the new dispensation entirely to Soviet Russia, for the destructive aspects of the Potsdam Declaration are to be found

in Anglo-American recommendations. It is needless to say that the safety of private property now depends not on law but upon the preponderance of force, so that it actually becomes safer to invest in a weak than in a strong country.

Another feature of the new era has been the doctrine of non-recognition which made recognition an approval and non-recognition a disapproval of the government to be recognized. There is a strong literary movement which asks rather logically but not soundly that governments intervene in the internal composition of foreign states to prevent dictatorships. The misfortunes attending this theory in Argentina and in Spain seem to have induced some realization that perhaps the Founders of this country were better advised in endorsing the recognition of *de facto* governments as the only tolerable way of international life.

There are other features of the Potsdam Declaration which give rise to equal doubts, such as territorial amputations, mass migrations, the restoration of slave labor, and so on. It must be recalled that there are only two elements of restraint upon the natural tendencies of a belligerent, first, the law of neutrality, whose violation always carried with it the danger of converting the neutral into an enemy, and, second, the fear of enemy reprisals. While the latter has not altogether exhausted its force, evident in the large number of prisoners taken by both sides, it has decidedly weakened in effect. Indeed, the atom bomb puts a premium on the speed of belligerency. The whole question needs a fundamental reëxamination in the cold light of reason.

What Would You Advise?

This is an actual occurrence in Burke County. At an Old Settlers Day at Bowbells, a carnival company was in attendance to furnish entertainment. During the night a man and woman of the carnival company became intoxicated, and in the early hours of the morning they became engaged in a quarrel. During the argument the custody of an auto became involved, and the woman maintained that the car was hers, and so that the man could not take it the woman either swallowed the ignition key or maintained she swallowed it. The next morning the man called at the sheriff's office for assistance in obtaining it. As the sheriff was out of town I advised the deputy sheriff to wait till the sheriff returned and let him investigate this very delicate situation, and as the sheriff retires from office January 1st, 1947, I hope he is able to get this matter cleared up before a new man takes office.—*Contributor: Earl Walter, Bowbells, North Dakota.*

UNITE AGAINST CRIME

By

John Edgar Hoover

Director, Federal Bureau of Investigation, Department of Justice

★

Condensed from

Domestic Commerce

September, 1946

THE rapid increase in criminal incidents throughout the United States affects citizens in every walk of life. In the business world, criminals have illicitly sought the goods which flow through the busy avenues of commerce. Such criminal activity has caused big and little businessmen alike to suffer huge monetary losses and on some occasions the loss of life.

There is little hope that crime can be completely erased from society. Our social structure has always known individuals who constantly attempt to violate the rights of others by robbery, theft, swindle, and scores of other unlawful means.

ANTIDOTE FOR CRIME

The businessman's antidote for crime depends chiefly upon two factors—preparedness and action. Preparedness requires not only the stengthening of our stores, our shops, our banks, and other establishments against the onslaughts of criminals, but also constant cooperation among all persons and organizations desiring to reduce, insofar as possible, criminal activity and the great cost of crime.

To accomplish these ends, there must be a close understanding between business and law enforcement. The criminal of today acts quickly and moves swiftly. Law enforcement, for its effectiveness in apprehending the criminal, relies to a great degree upon the alertness and cooperation of citizens. Immediate action in reporting criminal acts will enable law enforcement to carry on with success its responsibility in the fight against crime.

AID OF FBI

Businessmen are interested in stamping out crime not only because of its great overhead cost but also because crime disrupts business by affecting its securi-

ty. The files of the Federal Bureau of Investigation contain many cases in which businessmen have suffered because of crime.

The jurisdiction of the FBI extends generally to all Federal crimes not specifically assigned to other agencies of the Federal Government. Our duties in the general criminal field include, among many others, the enforcement of such laws as the Theft from Interstate Shipment Act, the National Stolen Property Act, Federal Bank Robbery Act, the National Bankruptcy Act, and the National Motor Vehicle Theft Act. The FBI is anxious to give its assistance to all businesses or individuals who may come within its jurisdiction.

Bogus-Check Rackets

The bogus-check artists have swindled and unfortunately will continue to defraud honest, sympathetic persons and businessmen who, by virtue of their work, must make snap decisions on the worthiness of the people with whom they deal. Businessmen, law-enforcement officers, and others are not helpless, however, in facing the beguilements of these unscrupulous individuals. In 1936 the FBI launched a program to obtain throughout the United States checks which were known to be fraudulent. Thousands of specimens of the handiwork of bad-check artists are maintained in this file.

Checks received by us are compared with those previously received to see whether or not there are any similarities. Through handwriting comparison and the analysis of other characteristics we make identifications regularly regardless of changes in name. This file serves law enforcement extensively and we are always glad to give as much help as possible to your local officers on this or any other matter of a criminal nature which requires a technical examination of evidence.

Peacetime Versions

Wartime conditions produced many fraudulent schemes which are being carried over into peacetime. Many chiselers wrongfully wore the uniform of our fighting men or represented themselves to be Government employees.

One person began a lucrative practice of representing himself as connected with the Office of Price Administration. He would contact owners and operators of restaurants and grills informing them he was checking on OPA matters. He would also display an outline of a proposed advertisement which was to be displayed in all cafes, hotels, restaurants, and night clubs, showing OPA prices and regulations. He sold space on this card for $20. His racket was brought to a close by his apprehension.

Two men in New York City devised a plan by which they impersonated officials of OPA.

They contacted New York manufacturers and advised them that violations of the OPA regulations had been detected in the companys' operations and that sizable fines would be anticipated. Then by devious means they suggested that the matter might be "arranged" by the payment of various sums. Their schemes fell through when one of their intended victims brought their activities to the attention of the FBI.

Arrangements were made by Special Agents to cover an expected "pay-off" of $2,000. One of the crooks was arrested when he picked up the package of money at a messenger-service office and his confederate was apprehended later. One of the criminals was convicted of Impersonation and of violating the Federal Conspiracy Statute and was sentenced to serve 3 years and pay a fine of $4,500. The other was a witness for the Government in the prosecution and was placed on probation for a probation for a period of 3 years.

Prompt Notification Needed

It is a violation of a Federal law within the jurisdiction of the FBI to steal from an interstate shipment moving via common carrier. A total of 1,023 convictions with sentences amounting to 2,221 years, 7 months, and 12 days resulted during the 1946 fiscal year as an outcome of the FBI's fight against criminals engaged in thefts from interstate shipment. Fines totaled $88,739, goods valued at $353,114 were recovered, and 151 fugitives were located and taken into custody.

An analysis of interstate thefts investigated by the FBI reveals that in some instances mobsters band together to make a "haul" and in other cases individuals operate alone. Their widespread activities dedicated to thefts and hijackings may affect the financial structure of business concerns throughout the Nation. Wholesale arrests and the quick recovery of goods by the FBI depend upon public cooperation. It is well to remember that every case of successful hijacking deprives the American public of needed commodities. Each theft from interstate shipment bolsters the morale of criminals and encourages them to increased activity. Prompt action in notifying the FBI of such thefts is effective insurance against continued losses.

Interstate Shipment Thefts

Thefts from interstate shipment at one business concern in Philadelphia stopped following the arrest by FBI agents of 14 persons and their conviction in Federal Court for participation in the theft of $25,000 worth of chocolate, clothing, cigarettes, and other commodities.

On December 10, 1943, several small thefts of merchandise were reported to the Philadel-

phia Office of the FBI. During the investigation which followed it was found that the trucking company had been suffering losses in shipments nearly every day for more than a year. It was ascertained that in November 1943 losses were averaging $500 per week, and at the time of the complaint to the FBI losses were amounting to $1,000 weekly. As soon as Special Agents commenced their investigation all thefts stopped.

It was found that one employee of the trucking company had a contract with a Philadelphia syrup company, and all the chocolate which he was able to steal was diverted from the consignee of the shipment to the syrup company. He also had an arrangement with a North Philadelphia "fence" to relieve him of stolen cocoa and fire extinguishers. One of the truck drivers perfected arrangements with a dealer and disposed of $500 worth of shirts. At the same time he was providing a local candy store operator with stolen chocolate and was selling rice and cocoa to the same fence used by the other employee. The assistant night foreman at the terminal cooperated with two other employees in stealing chocolate, coffee, and tea, transporting it to the "dump" in a 10-ton delivery truck, and receiving pay-offs from a black-marketeer.

Investigation in this case presented many challenges, for the trucking firm was carrying thousands of tons of freight and it was necessary to check thousands of waybills representing many shipments. In connection with their wholesale thefts, the thieves deliberately dropped and broke many cartons of goods and stole only a portion of each carton. It was necessary to prove in court the exact quantity of each commodity taken by each man, the exact shipment robbed, and the date and place of the theft, in addition to tracing each particular shipment from the consignor to the consignee in order to prove the interstate character of the shipment.

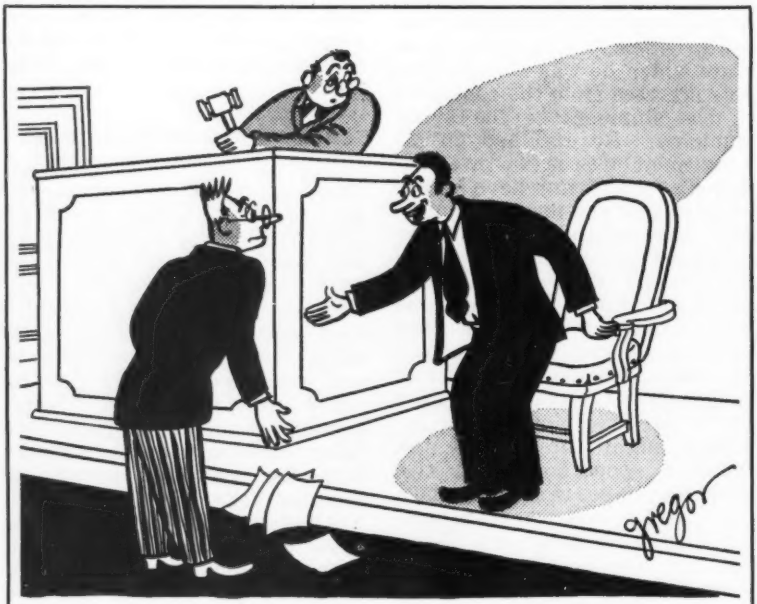
Criminal-Activity Increase

The increase in criminal activity in the United States is alarming. A grand total of 1,565,541 major crimes were registered for our Nation in 1945. This presented an increase of 12.4 per cent over the 1944 figure. The increases in crime were more pronounced and widespread in 1945 than in many previous years. Some criminal incidents are patterned after the violence and ruthlessness of gangs which operated in the midthirties.

All of us must be prepared to meet the challenge of crime. It is vitally important that any violations of Federal statutes within the jurisdiction of the FBI be promptly reported to its nearest office. The premises

where a crime has been committed should be protected in order to preserve valuable items of evidence. The names and addresses of all witnesses and information of value in their possession should be secured at once. Details of a crime and descriptions of the perpetrators will assist immeasurably in aiding law-enforcement officers. In all business establishments and particularly banking institutions, employees should carefully observe any suspicious strangers loitering around the premises.

Close and constant cooperation by businessmen and private citizens with all law-enforcement agencies will return dividends in security. Such cooperation will promote efficacious and proper functioning of law enforcement and will prevent a great upsurge of crime, which could certainly disrupt our business and social life.



"And I'd be pleased to know your name!"

Should the Trial Judge Assist Counsel to Establish a Prima Facie Case?

By J. M. RADIN
of the New York City Bar

IN every case brought into a court of law plaintiff has the burden of establishing a prima facie. This consists of the basic elements of the cause of action which are the essential prerequisites for the plaintiff to establish before the defendant is called upon to deny or prove an affirmative defense. The defendant is similarly situated when he endeavors to present an affirmative defense or counterclaim.

It is no more than a just and equitable principle of law that the party asserting the cause of action, defense, or counterclaim should have the burden, not only of going forward with proof, but also of establishing by a fair preponderance of the credible evidence, that which he asserts before the court.

This much is clearly defined and well understood, but when the subject is investigated in its more practical aspects, an interesting and debatable legal problem is presented that is but infrequently discussed. In a case where the facts constituting the cause of action are reasonably available and palpably exist, but due to inadvertence or incompetence the attorney for one of the parties fails and omits to get an essential element into the record, would it be an unjust canon of judicial ethics to require a trial justice to assist the plaintiff or defendant, as the case may be, to establish a prima facie case? Should the litigants stand in their counsel's shoes, for better or worse, without any outside assistance from the court?

The writer has long pondered the thought that it would be no more that just, fair, and equitable to create a norm of judicial conduct that would require that a trial judge point out to counsel for a litigant the particular flaw in his case so as to afford him an opportunity to rectify it before dismissing the case for failure to establish a prima facie cause of action or counterclaim.

Before the barrage of glittering generalities, it is always better to focus in mind a specific supposititious situation. Just as out of small acorns great oak trees grow, a lowly stairway

case can generate great legal principles.

Assume that the plaintiff has failed to prove himself free from contributory negligence. He had not been asked nor had he volunteered the information whether he walked down the steps slowly or fast; whether he held on to the bannister as he descended, and whether he looked in the direction in which he proceeded. Plaintiff rested and the defendant moved to dismiss the complaint on the ground that the plaintiff had failed to establish a cause of action.

How far, if at all, ought the trial court lend aid to assist the plaintiff to prove a prima facie case? Should it be sufficient after plaintiff rests and defendant moves to dismiss the complaint, upon one or a dozen grounds, for the court merely to inquire of plaintiff's counsel "What do you say, Mr. Jones?" Should the answer fail to satisfy the legal requirements, ipso facto, the motion is granted. Or, on the other hand, should plaintiff's counsel be advised by the court of his failure to prove plaintiff's freedom from contributory negligence or any other essential element of his case not only in general but in specific terms?

Very often, the neophyte at the bar is stage-struck and inadvertently is guilty of omission of an essential feature of his case. When confronted by a motion to dismiss at the end of plaintiff's case, he does not appreciate which of the several elements of the cause of action he has by-passed in the presentation of his case. Experienced trial counsel likewise sometimes neglect to prove a vital element in the chain of a cause of action. The pitfalls are numerous and a minute examination of the various tort, contract, and equity actions in order to point up the missing element would be mere redundancy.

The fault is not always with counsel. Just as frequently, if not more frequently, witnesses in court suffer nervous prostration and develop blind spots which cause the collapse of cases.

The fact is that daily in the cauldron of the courts, cases are dismissed for failure to prove an essential element of a cause of action. Often, counsel is unable to establish this element, even after due notice. At other times, the omission is due to ignorance or inadvertence. It is the latter situation that disturbs and perturbs one who seeks as close as possible an approximation of justice in the courtroom. Is the ideal judge the one who does not interfere for better or worse in the course of the trial, or should each participant in a lawsuit be entitled to the benefit of the aid and assistance of the trial court to ascertain the relevant facts

of a litigation? The goal of a trial judge is not to dispose of cases expeditiously, but to render justice between the parties before the court.

Is justice being rendered when success in the trial of a lawsuit is the result of an opponent's inadvertence or ignorance? Is it better that a just cause should perish for lack of skill in a party's advocate or that a participant in the trial of a lawsuit should fail because the court pointed out the omission in plaintiff's case and thereby brought out all the facts before the bar of justice.

Litigants should not prevail by virtue of technicalities along the road to the courthouse or in the courthouse. There is no fetish in the doctrine that plaintiff must establish a prima facie case which prevents and forbids a trial court from discovering and ascertaining whether genuinely and in good faith there exist facts which establish plaintiff's cause of action or the defendant's counterclaim.

The concept of a trial as a battle of wits or a game of chance where success or failure is dependent on the precise word has long been outmoded by modern jurisprudence. The truth is sought so that justice may prevail. And even if truth is hiding in the shade, the judge out to bring it into the sunlight.

Case and Comment
THE LAWYERS' MAGAZINE—ESTABLISHED 1894
AQUEDUCT BUILDING, ROCHESTER 3, N. Y.

GEORGE R. BUNDICK, *Editor*
GEORGE H. CHAPMAN, *Business Manager*

Represented by
NATIONAL PUBLISHERS REPRESENTATIVES, INC.
New York 17, N. Y.
114 East 47th Street
PLaza 3-5171

Chicago 5, Ill.
59 East Van Buren Street
Wabash 0152

Los Angeles 28, Calif.
6605 Hollywood Blvd.
Hempstead 3171

¶ Case and Comment is published bi-monthly by The Lawyers Co-operative Publishing Company, Rochester 3, New York, and Bancroft-Whitney Company, San Francisco 1, California. The publishers are not responsible for the personal views of the authors of signed articles. Their publication is not to be deemed an indorsement of any position taken on any controversial question.

The Lawyer's Equity

I had dictated a petition. The stenographer in transcribing her notes apparently misinterpreted the shorthand sign for the word "proper." For the closing line of the prayer she had written—and for such other and further relief as may be equitable and "profitable."

Contributor: Bryce Ballinger, Miami, Oklahoma.